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No. 90-79

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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RICHARD B. KAY,

*Petitioner,*

v.

BREMER EHRLER AND THE KENTUCKY BOARD OF ELECTIONS,

*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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## REPLY MEMORANDUM FOR PETITIONER

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In opposing certiorari, respondents concede that "[t]he circuits have split, quite widely, on the question of whether an award of attorney fees is appropriate when the pro se civil rights plaintiff [is] also an attorney" (Opp. 9). They also do not dispute petitioner's statement (Pet. 9) that the issue is one of great importance. Instead, they claim that "the factual circumstances of this case are [not] such as to warrant a decision of this Court upon the question" (Opp. 8).

In this respect, respondents appear to suggest that recovery is not appropriate here because "[t]here has been no showing of any actual pecuniary losses" and because this is not "a situation involv[ing] a broad deprivation of civil rights" (Opp. 11-12). The first point is irrelevant; the second is both irrelevant and factually inaccurate (since, as the magistrate noted (Pet. App. 20a), petitioner's suit benefited "voters and future candidates"). In any event, none of the conflicting decisions in this area has suggested that the right to recover

fees under Section 1988 can or should depend upon such particularized factual inquiries.[1]

Respondents do not dispute that petitioner is a pro se attorney (Opp. 3, 8); that he prevailed in his constitutional challenge to Ky. Rev. Stat. §§ 118.581 and 118.611 (Opp. 5-6); and that this case squarely presents the question of whether a pro se attorney may recover attorney's fees under Section 1988.[2] This case is thus an appropriate vehicle for deciding the purely legal issue of whether a prevailing pro se attorney is entitled to attorney's fees under Section 1988, a question that has sharply divided the circuits and that only this Court can resolve.

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 19, 1990

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[1] Respondents likewise err in suggesting that petitioner is seeking fees "because he had previously litigated the same question in 1980" (Opp. 15). In fact, petitioner is seeking fees only for the lawsuit that he commenced in January of 1988 (*see* Pet. App. 27a).

[2] Respondents note that an award of attorney's fees under 42 U.S.C. § 1988 "is, and always has been, subject to judicial discretion" (Opp. 14). This point is similarly irrelevant. As respondents' own authorities make clear, a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737-38 n.17 (1980) (citations omitted); *Criterion Club of Albany v. Board of Commissioners*, 594 F.2d 118, 120 (5th Cir. 1979). The courts below did not rely upon any "special circumstances" in denying petitioner's fee request. Instead, they concluded that pro se attorneys are prohibited as a matter of law from recovering attorney's fees. *See* Pet. App. 8a-9a, 16a, 27a-28a.